Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

(3)

No. 99-2001

In the

Supreme Court of the United States

OCTOBER TERM, 1999

JOHN DEW,

Petitioner,

v.

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Petition be Granted Because, After This Court's Decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), This Case Raises Important Questions Regarding the Necessity of Presenting Direct Evidence of Discrimination After Establishing a Prima Facie Case?

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PRELIMINARY STATEMENT

This Reply Brief is necessary to refute Respondents' assertion that this case does not present any issues meriting review by this Court. Contrary to Respondents' assertions, this case is not a "garden-variety discrimination case." (Opposition at i.) This Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), issued after the Petition was prepared and sent in for filing but before Respondents' filed their opposition, reaffirms the importance of the issues presented in this case.

In affirming the District Court's entry of summary judgment, the Second Circuit, after confounding the three prongs of the *McDonnell-Douglas* analysis, ultimately concluded that, whether or not Dew made out a prima facie case of discrimination, Dew did not present sufficient evidence of actual discrimination to avoid summary judgment.

The Second Circuit's determination that "the isolated racial remark Dew identified is not enough to survive summary judgment" is called into question by this Court's recent decision in *Reeves*. This Court made it clear in *Reeves* that an employee need not present evidence of intentional discrimination to challenge an employer's purported nondiscriminatory reason for termination and avoid having the case taken away from a jury. In addition to the reasons presented in the Petition itself, the Petition should be granted because, after *Reeves*, this case presents important issues regarding what evidence a party needs to present, such as the statistical evidence proffered by Dew, to avoid entry of summary judgment after establishing a prima facie case of discrimination.

POINT I – The Petition Should be Granted Because, After This Court's Decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), This Case Raises Important Questions Regarding the Necessity of Presenting Direct Evidence of Discrimination After Establishing a Prima Facie Case.

The Petition should be granted because, contrary to Respondents' assertion, this case presents significant issues relating to the evidentiary burden placed on plaintiffs in employment discrimination cases. The Second Circuit's decision is premised on Dew's alleged failure to prove by sufficient evidence of actual discrimination. This Court's decision in *Reeves* calls into question the Second Circuit's determination that, even if Dew established a prima facie case of discrimination, his alleged failure to present sufficient direct evidence of discrimination mandated entry of summary judgment. In *Reeves*, this Court established that indirect evidence of discrimination is sufficient to support a jury verdict finding discrimination. The Petition should be granted to establish that summary judgment should not be granted where a party presents some evidence that could be the basis for a jury verdict finding discrimination.

A. The Second Circuit Concluded That, Even if Dew Presented a Prima Facie Case of Discrimination, Dew Did Not Proffer Sufficient Evidence of Direct Discrimination to Survive Summary Judgment.

The Second Circuit's decision below raises issues similar to those confronted by this Court in *Reeves*. turned on precisely

the issue addressed by the Supreme Court in *Reeves*. In its decision, the Second Circuit discussed the issue of whether Dew established a prima facie case, which had been the focus of the District Court's entry of summary judgment. In doing so, as discussed in the Petition, the Second Circuit collapsed and confounded the *McDonnell-Douglas* analysis. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). In reaching its ultimate decision, however, the Second Circuit presumed that Dew did establish a prima facie case. Specifically, the Second Circuit stated that "we need not decide whether Dew made out a prima facie case." (A 10.) Instead, the Second Circuit focused exclusively on whether or not Dew had introduced direct evidence of discrimination and, in particular, evidence sufficient to establish that the RIF was a mere pretext for a racially-motivated termination. *Id.* The Second Circuit specifically stated that the "isolated racial remark Dew identified" as evidence of intentional discrimination "is not enough to survive summary judgment" *Id.* The court then concluded that, without evidence of intentional discrimination, the statistical evidence of the racial composition of HIP's workforce was "at best, inconclusive." *Id.* Concluding that this evidence was insufficient to be the basis for a jury verdict in his favor, the Second Circuit affirmed entry of summary judgment. *Id.* This analysis is called into question by this Court's recent decision in *Reeves*.

In *Reeves*, this Court rejected the "pretext-plus" analysis used by the Second Circuit in this case. *Reeves* involved a claim that the employee had been the victim of age discrimination when he was discharged by his employer. The Court of Appeals in *Reeves* determined that, even if the plaintiff established a prima facie case and proffered evidence that the purported nondiscriminatory basis for termination was pretextual, the employee failed to present sufficient evidence that the employment decision was motivated by age. *Reeves*, 120 S.Ct.

at 2107-08. This Court reversed, holding that the Court of Appeals "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. Instead, a prima facie case, coupled with "sufficient evidence to find that the employer's asserted justification is false" is enough for the jury to find in the plaintiff's favor. *Id.* at 2109. No direct evidence of intentional discrimination is necessary, which also contradicts previous decisions of the Second Circuit, including *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997). The decision in *Reeves* demonstrates this Court's intent to preserve the role of juries in determining facts related to discrimination cases.

B. This Cases Presents Significant Issues Regarding What Evidentiary Showing is Necessary, After Establishing a Prima Facie Case, to Avoid Summary Judgment.

Having decided in *Reeves* that a jury may find discrimination where a party establishes a *McDonnell-Douglas* prima facie case of discrimination, this case now presents the issue of what evidentiary showing is needed beyond the prima facie case to survive summary judgment. The Court of Appeals took this case away from the jury because it determined that, having established a prima facie case, Dew's statistical evidence and evidence of racially-insensitive remarks by his supervisor was not enough to survive summary judgment. The Petition should be granted to determine whether statistical evidence and indirect evidence of discrimination, such as that proffered by Dew, is sufficient to avoid summary judgment.

This Court has previously indicated that statistical evidence can be a basis for a finding of discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("statistics can be an important source of proof in employment

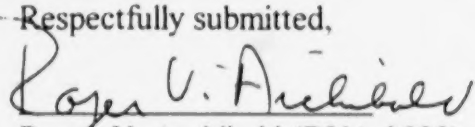
discrimination cases"). This case therefore presents the important issue of whether statistical evidence must be accompanied by direct evidence of discrimination for a jury to determine that an employer acted with discriminatory intent.

In *Reeves*, this Court reaffirmed the jury's central role in making a determination regarding whether a party suffered discrimination in employment. The Second Circuit's decision in this case is incompatible with *Reeves*. The Petition should be granted to consider what evidentiary showing is needed, post-*Reeves*, to avoid entry of summary judgment and allow the case to proceed to a jury.

CONCLUSION

The questions presented in this Petition are important questions of law involving this Court's supervisory power over the lower courts and the federal rules. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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